



Administrative Tribunal

Distr.
LIMITED

AT/DEC/586
20 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 586

Case No. 608: ATEFAT

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding;
Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas at the request of Bahram Atefat, a staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, the President of the Tribunal, with the agreement of the Respondent, extended to 20 March and 30 June 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 21 June 1991, the Applicant filed an application containing pleas which read, in part, as follows:

"1. The Applicant respectfully requests the Administrative Tribunal:

A. To find that the Respondent violated the implied contractual right of a United Nations staff member to fair and equitable treatment by not replying to the Classification Section's cable of 8 October 1984 requiring complete and accurate additional information for the classification of the Applicant's post ...

B. To declare that duplication of United Nations substantive reports is not consistent with the highest standard of efficiency, competence and integrity, ...

C. To find that the Director of ECDC [Economic Co-operation among Developing Countries] Division acted in violation of Article 101(3) of the Charter of the United Nations and staff regulations 1.1 and 1.2 by ignoring the specific position publicly stated on behalf of Secretary-General of UNCTAD; ...

D. To find that the removal of certain ratings from the Applicant's periodic report before the Rebuttal Panel begun its investigation is a recognition of and clear evidence of initial unjustified evaluation of the Applicant's performance by the ECDC Division's Director and the Chief of M. & F. [Monetary and Financial Co-operation] Section aimed at blocking his career development.

E. To hold that ECDC Division of UNCTAD benefited from the Applicant's self-financed external studies undertaken in the interest of the United Nations with the approval of the Secretary-General.

F. ... and to order Respondent to pay the Applicant as compensation for the financial burden and the injury he sustained:

(i) a sum equivalent to two years of the Applicant's salary and post adjustment including United Nations contribution to Pension Fund and all applicable taxes while the Applicant was on leave without pay for external studies in the interest of the United Nations, or up to the limit allowed under external studies program (ST/AI/281) (...);

(ii) tuition expenses paid by the Applicant at the Graduate school of Business Administration of New York University;

(iii) round trip air transportation expenses in economy class between Geneva and New York;

(iv) a sum equivalent to two months of the Applicant's salary for the stress suffered as a result of delays in the hearing of his appeals."

Whereas the Respondent filed his answer on 24 March 1992;

Whereas the Applicant filed written observations on 29 June 1992;

Whereas, on 19 and 20 October 1992, the Applicant submitted an additional statement and further documents and on 28 October 1992, the Respondent provided his comments thereon;

Whereas, on 29 October 1992, the Applicant submitted an additional statement;

Whereas, on 30 October 1992, the Tribunal put questions to the Respondent and on 4 November 1992, he provided answers thereto;

Whereas, on 9 November 1992, the Applicant submitted comments on the Respondent's submission, and on 10 November 1992, the Respondent submitted an additional statement;

Whereas, on 14 November 1992, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNCTAD on 26 April 1965, as a statistical clerk at the G-3 level. He served initially on short and fixed-terms appointments until 26 July 1965, when he was offered a probationary appointment. On 1 April 1967, he was offered a permanent appointment. On 1 June 1970, the Applicant was promoted to the P-1 level as an Assistant Economic Affairs Officer. On 1 April 1973, he was promoted to the P-2 level as Associate Economic Affairs Officer and on 1 July 1977, he was transferred to Geneva. On 1 April 1978, he was promoted to the P-3 level as an Economic Affairs Officer. The Applicant requested and was granted special leave without pay from 29 December 1980 to 22 December 1982, to pursue advanced studies at New York University, as authorized under the External Studies Programme. He resumed his functions at UNCTAD as an Economic Affairs Officer at the Division for Economic Cooperation among Developing Countries, on 23 December 1982.

On 25 October 1983, following the publication of the 1983 First Officer (P-4) Promotion Register, the Applicant instituted a recourse procedure before the Appointment and Promotion Committee (APC), asking that his name be included in the Register, but he was unsuccessful.

According to the statement of facts provided by the Joint Appeals Board (JAB) in its report, "During the 1984 promotion review, UNCTAD did not make formal recommendations to the Geneva APC for the 1984 First Officer (P-4) Promotion Register, due to post unavailability. However, it brought to the APC's attention a list of names of five staff members it considered of equal merit who would have been formally recommended had posts been available to

accommodate their promotion. The [Applicant's] name was not included in that list. It appears that the Geneva APC recommended to the Appointment and Promotion Board (APB), the inclusion of the names of the five staff members mentioned by UNCTAD and, in addition, another three, including [the Applicant's]".

While the 1984 promotion review was taking its course, the Applicant's job description was prepared and jointly signed by him and by the Director of his Division on 19 July 1984, for the purpose of establishing the level of his functions. On 6 August 1984, the Office of Personnel Services (OPS) classified the Applicant's post at the P-3 level.

Following that classification, the Applicant transmitted to the Classification Section of OPS at Headquarters, additional information concerning the nature of his functions. In a cable dated 8 October 1984, the Classification Officer, OPS, asked the Chief, Personnel Section, UNCTAD, for further information on the Applicant's post, including a review of "the job description", which would state "clearly each duty of the post and how it is assumed". He also asked for clarifications of the Applicant's functions.

On 14 November 1984, the Assistant Secretary-General for Personnel Services announced to the staff the 1984 First Officer (P-4) Promotion Register. The Applicant's name was not included. On 12 December 1984, the Applicant instituted a recourse procedure. On 3 June 1985, he was informed that it had been unsuccessful.

According to the record, on 4 July 1985, the Deputy Secretary-General of UNCTAD, wrote to Applicant's Division Director requesting that he forward a reply to the questions by the Classification Section in the cable dated 8 October 1984. According to the Respondent, on 16 July 1985, the Applicant's Division Director prepared a draft cable for transmittal to OPS. The draft cable was shown to the Applicant who did not agree with its contents and suggested amendments. The draft cable, with the changes proposed by the Applicant, was then sent to the Deputy Secretary-General of UNCTAD. He did not agree with Applicant's amendments and, in a routing slip to the Chief, Personnel Section, stated: "This is to clear ... draft, without the amendments proposed by [the Applicant]. You may wish to send the cable now". The cable, however, was never sent to the Classification Section.

On 22 November 1985, the Applicant was re-assigned to the Monetary and Financial Cooperation Section (MFCS). In a memorandum dated 25 February 1986, the Applicant wrote to the Deputy Secretary-General of UNCTAD, stating that his re-assignment to the MFCS amounted to a downgrading of duties and responsibilities. He also pointed out that UNCTAD had not responded to the cable of 8 October 1984, from the Classification Section concerning the level of his functions at his previous assignment and asked that a response be sent to OPS. According to the records of the JAB, the Deputy Secretary-General, UNCTAD, stated, in reply, on 5 March 1986, that he did not "see what purpose is to be served if a reply were sent now, particularly since you are no longer in the functions to which the job description concerned refers."

On 16 December 1985, the Assistant Secretary-General for Personnel Services announced to the staff in ST/IC/85/61 the 1985 First Officer (P-4) Promotion Register. The Applicant's name was not included. On 30 January 1986, the Applicant instituted a recourse procedure before the APC asking that his name be included in the Register. On 19 June 1986, he was informed that the recourse had been unsuccessful.

The Applicant's performance during the period 28 December 1980 through 31 July 1984, was evaluated in a performance evaluation report signed by the Deputy Secretary-General of UNCTAD and by the Applicant on 14 March 1986. On 11 April 1986, the Applicant instituted a rebuttal to this report. In his appraisal of the rebuttal and of the report of the panel constituted to investigate the rebuttal, the Secretary-General of UNCTAD concurred with the panel's view that "the value to the Organization of the [Applicant's] studies while on leave without pay, covering over fifty per cent of the reporting period, should have been recorded". He therefore decided that the following statement be included in the report: "[the Applicant's] performance has convinced me that the Division has profited in no small measure from the external studies he recently undertook in New York." He also stated that it was "regrettable that the report, due in August 1984, was completed only in March 1986. Both the [Applicant] and the Organization are entitled to timely completion of performance evaluation reports."

On 17 July 1986, the Applicant requested the Secretary-General to review the decision not to include his name in the Promotion Register. He asked for compensation "for the damages inflicted upon [him] due to

non-observance of the terms of [his] appointment." On 29 July 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that "Decisions on promotion are discretionary decisions of the Secretary-General" and that "The Appointment and Promotion bodies, being joint bodies, do not make administrative decisions, and their recommendations or non-recommendations are not therefore eligible for review under staff rule 111.2(a)."

On 22 December 1986, the Applicant lodged an appeal with the JAB. The Board adopted its report on 26 July 1990. Its decisions, conclusions and recommendation read as follows:

"Decisions, Conclusions and Recommendation

68. The Panel decides that the Appellant's claim concerning the decision not to include his name in the 1983 and 1984 First Officer (P-4) Promotion Registers is time-barred.

69. The Panel further decides that the Appellant's claim concerning the decision not to include his name in the 1985 P-4 Promotion Register is receivable.

70. The Panel concludes, in the light of the Tribunal's case-law in Upadhya, Judgement No. 401, that recommendations or non-recommendations by the APB or APC constitute administrative decisions within the meaning of staff rule 111.2(a) and therefore eligible for review under that Staff Rule.

71. The Panel further concludes that the procedures followed by the appointment and promotion bodies in reviewing the Appellant's case for promotion in the 1985 P-4 promotion exercise or the decision of the Secretary-General not to include his name in that Register were not vitiated by prejudice, breach of procedure or any other extraneous factors and, therefore, cannot be contested.

72. The Panel also concludes that it was UNCTAD's responsibility to reply to the cable of 8 October 1984 from the Classification Section concerning the Appellant's post classification.

73. The Panel further concludes that the Appellant's claim that he was denied full and proper consideration during the 1985 promotion review is lacking in substance, since he availed himself of the recourse procedure instituted for that

purpose and that the Geneva APC was in possession of all relevant facts when it reviewed the Appellant's case for promotion and decided not to include his name in the 1985 P-4 Promotion Register.

74. The Panel finally concludes that a compensation for the regrettable delay in the consideration of this case cannot be justified considering that such a delay was due to a combination of events, for which JAB was partly responsible, and actions on the part of the Appellant.

75. Accordingly, the Panel makes no recommendation in support of the appeal."

On 6 September 1990, the Under-Secretary-General for Administration and Management informed Applicant that the Secretary-General had decided, in light of the JAB's report, to maintain the contested decision and to take no further action on the matter.

On 21 June 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's assignment to different functions constituted duplication of work undertaken by other divisions of UNCTAD, and was in violation of staff regulations 1.1 and 1.2 and Article 101(3) of the Charter.

2. The Applicant's performance evaluation report for the period 1 August 1984 through 31 August 1987, was not prepared in conformity with administrative instruction ST/AI/240/Rev.1.

3. The Applicant's performance evaluation report for the period 28 December 1980 through 31 July 1984, and his job classification, essential for the consideration of his promotion, were missing, due to the negligence of the UNCTAD Administration.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeals against the decisions not to include his name in the 1983 and 1984 First Officer (P-4) Promotion Registers are time-barred.

2. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was given such consideration and the decision not to include his name in the 1985 First Officer (P-4) Promotion Register was not marred by procedural deficiencies or impropriety.

3. The Applicant's claims concerning his performance evaluation report for the period 1984 to 1987 and his work assignments within UNCTAD are not receivable.

4. In the absence of any violation of any term or condition of the Applicant's contract of employment, there is no basis for an award of compensation.

The Tribunal, having deliberated from 27 October to 20 November 1992, now pronounces the following judgement:

I. The Applicant asserts that when he resumed his duties after leave without pay from 29 December 1980 to 22 December 1982, which he had been granted to pursue external studies, the Secretary-General failed to fulfil his contractual obligations towards him under the relevant Staff Rules and Regulations. The Applicant also argues that the Respondent did not provide essential information required for the proper consideration of his case by the reviewing bodies in a timely fashion. The Applicant further alleges non-observance by the Secretary-General of the relevant provisions of administrative instruction ST/AI/240/Rev.2 of 28 November 1984, with respect to his performance evaluation reports and the rebuttal he instituted.

II. The main issue in this case concerns the non-inclusion of the Applicant's name in the 1983, 1984 and 1985 First Officer (P-4) Promotion Registers.

III. As regards the promotion review exercises for 1983 and 1984, the Applicant submitted recourses to the Appointment and Promotion Committee (APC) against his non-inclusion in the Promotion Registers for those years. The recourses were dated 25 October 1983 and 12 December 1984, respectively. Both were rejected. The Applicant was notified of the negative outcome on 2 April 1984 and 3 June 1985, respectively. The Applicant did not pursue the matter

further and only raised it again on 30 January 1986, when appealing against his non-inclusion in the 1985 First Officer (P-4) Promotion Register.

In view of these circumstances, the Joint Appeals Board (JAB) considered that the Applicant's claims concerning the non-inclusion of his name in the 1983 and 1984 First Officer (P-4) Promotion Registers were time-barred.

The Tribunal concurs and therefore will not entertain these claims.

IV. The Tribunal will only consider whether the decision by the Secretary-General not to include the Applicant's name in the 1985 First Officer (P-4) Promotion Register, upon the recommendation of the APC, violated the Applicant's rights. In this respect, the Tribunal recalls that, in accordance with its jurisprudence, a staff member can have no automatic right to promotion. The Tribunal held in Judgement No. 134, Fürst (1969), paragraph III, that "appointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same." The Tribunal is unable to find any commitment, tantamount to an obligation, on the part of the Administration concerning the Applicant's promotion.

V. The Tribunal has also held that the general rule is that promotions are at the discretion of the Secretary-General and that, consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy of promotion. (Cf. Judgement No. 312, Roberts (1987), para. II).

VI. Nevertheless, the Tribunal has consistently held that staff members are entitled to be properly considered for promotion and that failure on the part of the Administration to afford such consideration constitutes a violation of the staff member's rights and calls for compensation. (Cf. Judgement No. 266, Capio (1980)). This is the Applicant's contention in the present case. He claims that by not forwarding a new job description as requested by the APC, and also, by failing to prepare a timely and proper performance evaluation report, the Administration deprived him of his right to be properly considered for promotion by the appropriate reviewing bodies.

VII. The Applicant alleges that his rights were violated by the Administration's failure to send a reply to a cable from the Classification Section, requiring complete and accurate additional information on the Applicant's duties, as requested by the APC. The Tribunal finds that omission regrettable and considers it an inadmissible act of administrative negligence. It was UNCTAD's responsibility to reply to the cable of 8 October 1984 from the Classification Section, whether or not the Applicant agreed with the content of the reply. The Tribunal cannot but emphasize that the Administration must ensure that the prescribed procedures for the classification of posts are strictly observed in the future.

VIII. The Tribunal will not speculate on what the outcome of the Applicant's request for review of his post classification might have been if UNCTAD's reply had eventually been sent to the Classification Section. The Applicant was aware that no reply was sent by UNCTAD to the Classification Section's cable of 8 October 1984. He did not, however, pursue the matter by addressing a formal recourse to the Classification Appeals and Review Committee, in accordance with the procedures set out in administrative instruction ST/AI/277. Accordingly, the Tribunal is of the view that the non-submission of the Applicant's new job description to the APC was not exclusively the fault of the Administration. It can therefore not be concluded that the non-inclusion of the Applicant's name in the promotion register was tainted on this ground. Furthermore, even though the post might have been reclassified, the Applicant had, by then, been assigned to a different post.

IX. The Applicant also claims that the APC could not have given proper consideration to his promotion because his performance evaluation report covering the period 1980-1984 had not been prepared in a timely fashion. The Tribunal notes that the Applicant's contention is not without merit. According to information provided to the Tribunal by the Respondent, the Applicant's performance evaluation report for this period "was completed in March 1986 ... that is, almost three months before [the] Applicant's recourse procedure to the APC was finalized. [The] Applicant thus had the opportunity to highlight this new information during the pendency of his recourse to the

APC and bring it to the attention of the APC if he thought it of relevance." The Respondent contends that it was the "Applicant's obligation to bring to the attention of the APC any additional information, such as his completed PER [performance evaluation report] for the period 1980-1984, if [the] Applicant considered such information decisive for the outcome of his recourse." The Tribunal cannot concur in this contention. It is the responsibility of the Administration to ensure that personnel records required by promotion review bodies are complete, up-to-date, and submitted in a timely fashion. The Tribunal finds that the Applicant's right to be duly considered for inclusion in the 1985 Promotion Register was not fully respected and, as a consequence, the responsibility of the Organization is engaged.

X. The Tribunal notes that in a letter dated 7 December 1989, addressed to the Secretary-General and later communicated to the JAB, the Applicant, while complaining about the delays in the consideration of his case, stated: "I should like to amend my original case as submitted on 17 July 1986, to include the latest developments covering my second performance evaluation report [covering his period of service from 1 August 1984, through 31 August 1987] and the report of the rebuttal investigation which was sent to me only on 12 October 1989." In the same letter, he also sought the Secretary-General's agreement to submit his appeal directly to the Tribunal.

On 15 December 1989, the Applicant wrote to the Secretary of the JAB, regarding the proceedings before the JAB, stating that, if the JAB wished to consider additional information, he would "be very happy to meet such a request in writing immediately and without prejudice to my request addressed to the Secretary-General ... as contained in my letter of 7 December 1989, copy attached". He added: "I also amended my original case as submitted on 17 July 1986 to include the latest developments concerning my performance evaluation report and the report of the rebuttal investigation."

In a letter dated 19 December 1989, the Secretary of the JAB acknowledged receipt of the letter of 15 December 1989, and stated: "Your letter with attachments will be transmitted to the JAB Panel which was constituted to consider your case." On 16 January 1990, the Officer-in-Charge,

Department for Administration and Management, informed the Applicant that the Secretary-General could not agree to his request made on 7 December 1989, to submit his case directly to the Tribunal. He noted: "... Your appeal raises a number of matters which require a factual determination, for which a JAB is the appropriate body."

The Respondent in his answer dated 20 March 1992, contends that the Applicant's allegations concerning the issue of his performance evaluation report, was neither submitted to, nor considered by the JAB. Therefore, the Respondent asserts, the allegations relating to that report are not receivable. The Respondent also submits that "in any event, any complaint by the Applicant concerning his second PER [performance evaluation report] is now time-barred as Applicant did not avail himself of the appeal procedures within the time specified in staff rule 111.2(a)(ii)."

XI. The Tribunal does not concur in that conclusion. It considers that the Applicant must have assumed that the JAB would, in the light of the exchange of correspondence described above, consider all the material relating to the performance evaluation report in question and its rebuttal. The Tribunal finds that there were irregularities in the handling of the additional claims submitted by the Applicant in his amended pleas, since the Applicant was erroneously led to believe that these new pleas were before the JAB and would be properly considered.

XII. The Tribunal observes that pleas (B), (C) (D) and (E) relate to issues that were not submitted to, nor considered by, the JAB and are therefore not properly before the Tribunal.

XIII. The Tribunal notes that it took the JAB nearly four years, from December 1986, when the Applicant lodged his appeal, to 26 July 1990 for the JAB to adopt its report. It was communicated to the Applicant in September 1990. During the proceedings, the Applicant and his counsel were invited to attend five meetings to consider his case. Four of them were cancelled because of the absence of one of the members of the JAB. The Tribunal notes that the JAB, in its conclusions, admits that the delay in the consideration of the case was "regrettable" and "due to a combination of events, for which [the] JAB was partly responsible."

XIV. In this connection, the Tribunal emphasizes, as it did in Judgements No. 353, El-Bolkany (1985), para. X, and No. 414, Apete (1988), para. XIV, that an inordinate delay "not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering on an Applicant".

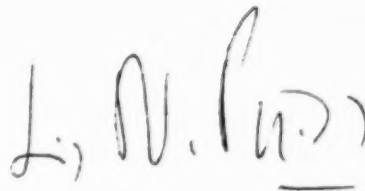
XV. In the light of the foregoing, the Tribunal decides that:

(1) The Applicant be paid compensation in the amount of three months of his net base salary at the rate in effect on the date of this judgement, for the damage he sustained as a result of administrative irregularities committed in connection with his case, as well as the sum of \$1,000 for delays in the consideration of his case by the JAB;

(2) All other claims are rejected.

(Signatures)

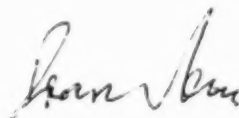
Luis de POSADAS MONTERO
Vice-President, presiding



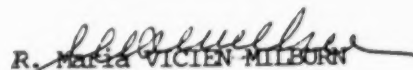
Arnold KEAN
Member



Ioan VOICU
Member



New York, 20 November 1992



R. MARIA VICIEN MILBURN
Executive Secretary